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IN THE

Supreme Court of the United States

October Term, 1970
No. 45 Original

STATE OF WASHINGTON, STATE OF ILLINOIS,
STATE OF ARIZONA, STATE OF COLORADO,
STATE OF HAWAII, STATE OF IOWA,
STATE OF KANSAS, STATE OF MAINE,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MINNESOTA, STATE OF MISSOURI,
STATE OF OHIO, STATE OF RHODE ISLAND,
STATE OF VERMONT and COMMONWEALTH OF VIRGINIA,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
a Delaware corporation,
FORD MOTOR COMPANY,
a Delaware corporation,
CHRYSLER CORPORATION,
a Delaware corporation,
AMERICAN MOTORS CORPORATION,
a Maryland Corporation,
AUTOMOBILE MANUFACTURERS ASSOCIATION,
a New York corporation,
Defendants.

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

Counsel of Record:

FREDRIC C. TAUSEND
Special Assistant
Attorney General,
State of Washington

WILLIAM L. DWYER
Special Assistant
Attorney General,
State of Washington

ROBERT S. ATKINS
Assistant Attorney
General,
State of Illinois

Post Office Addresses:

657 Colman Building
Seattle, Washington 98104

Hoge Building
Seattle, Washington 98104

188 West Randolph
Chicago, Illinois 60601

CRAFTSMAN & HET PRESS SEATTLE, WASHINGTON

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IN THE

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STATE OF WASHINGTON, STATE OF ILLINOIS,
STATE OF ARIZONA, STATE OF COLORADO,
STATE OF HAWAII, STATE OF IOWA,
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GENERAL MOTORS CORPORATION,
a Delaware corporation,
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CHRYSLER CORPORATION,
a Delaware corporation,
AMERICAN MOTORS CORPORATION,
a Maryland Corporation,
AUTOMOBILE MANUFACTURERS ASSOCIATION,
a New York corporation,
Defendants.

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

Plaintiffs file this supplemental memorandum of law for the purpose of bringing new material to the attention of this Court, specifically to answer the following questions raised during the oral argument before this Court in *State of Ohio, ex rel. Paul W. Brown, Attorney General of Ohio, Plaintiff v. Wyandotte Chemicals Corporation, et al., De-*

fendants, Original Action No. 41, insofar as they appear applicable to the instant case.

1. If the Supreme Court were to accept original jurisdiction in *State of Washington, et al. v. General Motors Corporation, et al.,* Original Action No. 45, what substantive law would it apply?

2. Under standards analogous to these enunciated in respect to the doctrine of *forum non conveniens,* should this Court exercise its original jurisdiction in this case?

I.

THE APPLICABLE SUBSTANTIVE LAW

The complaint which plaintiffs seek leave to file has three counts. Count I states a claim under the federal Sherman Act. Clearly, federal law applies, specifically the federal statutory and case law developed under the Sherman Act.

Count II states a common law conspiracy in restraint of trade. It is a contingent or supportive claim, included as a hedge against an argument made by the defendants in related actions—but not to date in this action—that the equitable relief available under Section 16 of the Clayton Act is less broad than the powers of an equity court at common law. The evidence which would be introduced to prove Count II is identical to that needed to prove Count I. Plaintiffs are confident that if defendants' argument is made in this case it will be rejected and therefore choice of law under Count II will be a moot question. If such is not the case, however, the answer in respect to Count II should be the same as it would be in respect to Count III (see below).

Count III states a claim against the defendants in tort, namely public nuisance. In determining what law would apply, this Court should identify that nuisance as it exists in fact.

Defendants in their brief analyze Count III as if it stated seventeen separate actions for nuisance by seventeen separate states. Such an analysis would suggest that the common law nuisance of each plaintiff state be applied in respect to each plaintiff state's claim. But Count III does not plead seventeen separate nuisances; it pleads one tort of nuisance namely air pollution caused on a national scale—by motor vehicles manufactured by the defendants. Count III as pleaded describes the alleged nuisance as it really is—a national nuisance.

It should be clear that the air pollution described in Count III, irrespective of whatever differences may exist in the common law of the several plaintiff states, is not a different nuisance in Massachusetts or in Vermont, than it is in Rhode Island. Moreover, the evidence will show that pollutants emitted by motor vehicles driven in Massachusetts constitute a nuisance (i.e. pollute the air) in Vermont and Rhode Island. That being the case, it would be inappropriate for this Court to apply the law of any one state to Count III. Fortunately, precedents give this Court a wiser choice.

In original actions in suits between states this Court has fashioned and applied an interstate common law. *Kansas v. Colorado,* 206 U.S. 46, at 98 (1907). See also *Hinderlider v. La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92 (1938). This Court's opinion per Mr. Justice Brandeis, decided the same day as *Erie R. R. v. Tompkins,* 304 U.S.

64 (1938), described the question of whether the water of an interstate stream must be apportioned between the two states as "a question of 'federal common law' ". 304 U.S. at 110. See *The Original Jurisdiction of the United States Supreme Court,* 11 Stan. L. Rev. 665 at 681-682. See also Simkins *Federal Practice,* 3rd Ed. 1938, § 1135, pages 828-830.

Although this Court in *Georgia v. Tennessee Copper Company,* 206 U.S. 230 (1906), did not state what law it was applying it would appear from the argument made by Georgia that this Court was being asked to apply not only the statute law of Georgia but also the same kind of general federal interstate common law mentioned by Mr. Justice Brandeis in *Hinderlider v. La Plata River & Cherry Creek Ditch Co., supra.*

The argument states:

> . . . The mere fact that the subject matter of the controversy is a public nuisance affords no right of action in the premises to any private person. *Not only is this a general rule of law* but it is also incorporated in the statute law of the State of Georgia. Citizens of Georgia, by reason of the statutes denying them right of action in the premises, would have been powerless, the right of redress in such matters being reserved solely to the State.
>
> Sections 3858 and 4761 of the Code of Georgia of 1895 are practically nothing more than the codification of the law as it existed. The *general rule* is stated in *In re Debs,* 158 U.S. 587. And see *Attorney General v. Tudor Ice Co.,* 104 Massachusetts, 239; *Attorney General v. Jamaica Pond Corporation,* 133 Massachusetts, 361; *State v. Goodnight,* 70 Texas, 682. (Emphasis added) 206 U.S. at 231.

It should be noted that the fact that this Court in *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 54 U.S. (13

How.) 518 at 563 (1851), applied the state common law of Virginia is *not* an exception to the above practice because the nuisance in that case (the erection of a bridge over the Ohio River) was entirely within the state limits of Virginia.

In *Georgia v. Tennessee Copper, supra,* the nuisance was interstate from Tennessee to the air over Georgia. In the instant case as alleged in Count III the nuisance is interstate affecting not only all plaintiff states but every region and every state in the nation.

Consistent with scientific fact and the precedents of this Court an interstate or national common law should apply.

II.

UNDER PRINCIPLES ANALOGOUS TO FORUM NON CONVENIENS THE ORIGINAL JURISDICTION OF THIS COURT IS THE MOST SUITABLE FORUM

Plaintiff states understand that during the argument in *Ohio v. Wyandotte, supra,* several analogous situations were mentioned as possibly supplying guidelines to this Court in exercising its discretion as to the acceptance of original jurisdiction in suits brought by a state against citizens of another state.

Since the choice of law in the instant case requires the application of federal law, analogies to abstention in diversity cases involving questions of state law are not apposite.

Plaintiff states believe that there are no standards established in other types of cases which would be directly applicable here and that the most useful guidelines are those established by this Court in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439. (See Plaintiffs' Brief 9-11, 19-20, Reply Brief 2-14).

However, insofar as standards established by the doctrine of *forum non conveniens* and its federal statutory equivalent 28 U.S.C. § 1404(a) are applicable, these standards support the exercise of original jurisdiction in this case.[1]

The principal factors to be considered by a Court on a motion to transfer venue or in applying the doctrine of *forum non conveniens* were set forth concisely by this Court, through Mr. Justice Jackson in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). In that case this Court divided the factors into two groups, the private interest of the litigant and public interest. Under the category of private interest factors, Mr. Justice Jackson listed:

1. The relative ease of access to sources of proof;

2. Availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses;

3. Possibility of view of premises, if view would be appropriate to the action;

4. All other practical problems that make trial of a case easy, expeditious and inexpensive;

5. Enforcibility of a judgment if one is obtained;

6. The plaintiff's choice of forum.

Point 3 is not applicable. Points 1, 2, 4, 5 and 6 all weigh in favor of original jurisdiction. If the seventeen plaintiff states were able to file this identical action, including Count III, in a single federal district court, the probable forum chosen would be the central district of Los Angeles. Yet even that court, as pointed out by the defendants them-

1. 28 U.S.C. § 1404 (a) reads as follows:

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

selves in argument before the Judicial Panel on Multidistrict Litigation,[2] has less access to all the sources of proof in this case than would this Court trying the case through a master. Depositions, it is true, can be taken anywhere, but personal attendance of out of state witnesses in Los Angeles cannot be compelled.

If credibility becomes an issue on the question of conspiracy, live testimony is clearly preferable. Federal masters can and do sit throughout the country to take testimony.

As to enforceability of a judgment, a nationwide injunction as sought by plaintiff states would at least be more appropriately enforced by this Court and possibly more effectively enforced by this Court, again through a master free to travel to Michigan and nationwide to make appropriate findings on compliance.

Under the category of factors of public interest, Mr. Justice Jackson listed:

> 1. Administrative difficulties which follow for courts when litigation is piled up in congested centers instead of being handled at its origin;
>
> 2. The burden of imposing jury duty upon the people of a community which has no relation to the litigation;
>
> 3. Reason for holding the trial in view of persons whose affairs are touched by the litigation rather than in remote parts of the country where such persons can learn of it by report only;

---

2. Defendants' counsel pointed out that the "center of gravity" of the action lies in Detroit. See Motor Vehicle Air Pollution Control Equipment Antitrust Litigation, Docket No. 31, Transcript of Friday, March 20, 1970, pages 7-10, attached as Appendix A. Moreover, on the question of the fact of damage and the impact of the alleged air pollution, witnesses will undoubtedly be required from a number of the plaintiff states and the several sections of the country.

4. The local interest in having localized controversies decided at home;

5. The appropriateness of having a diversity case tried in a forum that is at home with the state law which must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself. 330 U.S. 508-509

Insofar as these public principles apply at all, they do not suggest a single federal district court in Los Angeles or elsewhere as a more "convenient" or appropriate forum. This case, as demonstrated by the identity of the seventeen plaintiff states, the fact that these states represent every section of the land and over 30% of the nation's population, and the fact that the complaint alleges a nationwide conspiracy and a nationwide nuisance, is a national not a local case in every sense of the word. It deserves a nationwide forum. At the present time only the original jurisdiction of this Court furnishes such a forum.

Respectfully submitted,

Dated February 12, 1971

STATE OF WASHINGTON
SLADE GORTON, Attorney General
FREDRIC C. TAUSEND, Special Assistant Attorney General
657 Colman Building
Seattle, Washington 98104
WILLIAM L. DWYER, Special Assistant Attorney General
Hoge Building
Seattle, Washington 98104
DAVID G. KNIBB, Special Assistant Attorney General

STATE OF ILLINOIS
WILLIAM J. SCOTT, Attorney General

ROBERT S. ATKINS, Assistant
Attorney General
188 West Randolph
Chicago, Illinois 60601

DAVID C. LANDGRAF, Assistant
Attorney General

STATE OF ARIZONA

GARY NELSON, Attorney General

MALCOLM P. STROHSON, Assistant
Attorney General

STATE OF COLORADO

DUKE W. DUNBAR, Attorney
General

JOHN MOORE, Deputy Attorney
General

WILLIAM TUCKER, Assistant
Attorney General

STATE OF HAWAII

BERTRAM T. KANBARA, Attorney
General

GEORGE PAI, Deputy
Attorney General

STATE OF IOWA

RICHARD C. TURNER, Attorney
General

STATE OF KANSAS

KENT FRIZZELL, Attorney General

RICHARD HAYSE, Assistant
Attorney General

STATE OF MAINE

JAMES S. ERWIN, Attorney General

COMMONWEALTH OF MASSACHUSETTS

ROBERT H. QUINN, Attorney
General

NEAL COLICCHIO, Assistant
Attorney General

STATE OF MINNESOTA
DOUGLAS M. HEAD, Attorney General

STATE OF MISSOURI
JOHN C. DANFORTH, Attorney General

STATE OF OHIO
PAUL W. BROWN, Attorney General
DONALD WECKSTEIN, Assistant Attorney General

STATE OF RHODE ISLAND
HERBERT F. DESIMONE, Attorney General

STATE OF VERMONT
JAMES M. JEFFORDS, Attorney General
JOHN D. HANSEN, Assistant Attorney General

COMMONWEALTH OF VIRGINIA
ANDREW P. MILLER, Attorney General
ANTHONY F. TROY, Assistant Attorney General

APPENDIX A

Motor Vehicle Air Pollution Control Equipment Antitrust Litigation, Docket No. 31, Transcript of Friday, March 20, 1970, pp. 7-10

MR. CUTLER: Right. And we think this is an appropriate case before you now.

I take it in this connection that the critical question for the Panel to determine, to use Judge Wisdom's phrase in the Children's Book Case, is where the center of gravity of these actions lies. In our view that center of gravity plainly lies in the Detroit area. This is where the headquarters of the four defendant passenger car manufacturers are located.

This is where the Automobile Manufacturers Association, which administered the cooperative research program, is located.

This is where almost all of the pertinent meetings relating to that program were held. Where almost all of the pertinent documents originated, and where most of the witnesses who know anything at all about that program were and live.

It is not an accident or a mere newspaper headline by a short end that the automobile industry is usually referred to as Detroit. That Californians and others blame automotive emissions on Detroit. They use the term "Detroit" as a synonym for the industry. No other city in the country, except perhaps Hollywood, has become as much of a synonym for an entire industry as Detroit.

Now, in proposing Detroit as the most appropriate forum, we are not doing so in order to find ourselves a friendly judge. We accept that the judges in any district would be impartial and a Detroit judge is no more likely to be predisposed toward the defendants in these cases than a judge in any of the districts where the public body of plaintiffs have elected to file their cases is likely to be predisposed toward those plaintiff bodies.

For example, the State of California in Los Angeles; the State of Wisconsin in Madison; the State of Illinois in Chi-

cago, the Aldermen in Chicago; the City of Philadelphia in Philadelphia; the State of New York in New York City.

In any event, as Your Honors of course know and have done before, whatever forum is selected, the Panel has the option, with the consent of the appropriate Chief Judge of the District, to select a Circuit Judge or a District Judge from another district to handle the pretrial proceedings.

The reasons in favor of Detroit, we believe, are reasons of location, not reasons relating to the identity or the friendliness of a judge.

The largest single group of witnesses having knowledge of the facts relating to the core of the complaints in these cases is located in Detroit.

CHIEF JUDGE MURRAH: Would you repeat that.

MR. CUTLER: The largest single group of witnesses, Judge Murrah, who have knowledge of the facts relating to the core allegations of this complaint, the allegations that the automobile companies engaged in an unlawful conspiracy, they are all—almost all of them—located in the Detroit area.

They are the automobile company scientists, engineers and executives who have been working on emission control problems for the past seventeen years.

We estimate that over 300 such individuals employed by these defendant companies have served as members of the various AMA emission control committees that have been working in this area since 1953.

And that a substantial number of these people, perhaps well over a hundred, are still working on emission control matters in the Detroit area. They are working overtime schedules in an effort to meet the higher emission control standards that have already been promulgated for 1974 in California and are scheduled for 1975 around the rest of the country.

And they are working on the effort which has received so much public attention to eliminate harmful emissions completely within a very short time after that.

Now, we recognize that these men undoubtedly are

going to have to lose some time from their work in preparing for depositions and testimony in these proceedings, but we respectfully submit that it is very much in the public interest to hold the amount of lost time to the absolute minimum, and that this can best be done by transferring the cases to the Eastern District of Michigan.

CHIEF JUDGE MURRAH: Most all of the discovery will be depositional, will it not?

MR. CUTLER: The discovery will be depositional and documentary, yes.

CHIEF JUDGE MURRAH: And it will be just as easy and facile to conduct the deposition program in Detroit with the witnesses there, if the cases were transferred elsewhere as if they were transferred to the Eastern District of Michigan?

MR. CUTLER: We recognize that that possibility is open, Judge Murrah, and that the panel has availed itself of the possibility before, but we think that would require either extensive delays in completing each deposition, while the lawyers travel to the transferee forum to argue deposition objections, or that it would require the designation of a separate additional judge in Detroit to hear and rule on the objections.